

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
TOPGALLANT LINES, INC.	)	
(Chapter 7 Case <u>89-41996</u> )	)	Number <u>90-4072</u>
	)	
<i>Debtor</i>	)	
	)	
	)	
	)	
AMBASSADOR FACTORS,	)	
Division Fleet Factors Corporation	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
	)	
v.	)	
	)	
FIRST AMERICAN BULK	)	
CARRIER CORPORATION, et al	)	
	)	
<i>Defendant</i>	)	

**PRE-TRIAL ORDER**

The United States District Court for the Southern District of Georgia

remanded the following issues to this Court for determination:

V. Whether the freights of the last voyage of the M/V DELAWARE BAY are subject to Ambassador's security interest.

VI. Whether freights remain subject to maritime liens even though paid to Ambassador or an agent of the debtor.

VII. Whether the single voyage rule affects only the priority of maritime liens on freights.

A pre-trial conference was conducted on February 12, 1996. At that time it became apparent that issues six and seven are narrow and discrete issues relating to the claims of only four maritime lienholders, to wit: Kurz-Moran Shipping Agencies, Inc., Stute International, Inc., MBS Diesel-Sulzer Diesel, and Eagan Marine. The law firms of counsel representing Ambassador Factors and counsel representing these claimants have recently merged and substitute counsel for both Ambassador and these claimants in regard to issues six and seven are being obtained. Because, to this point, the parties are uncertain whether to pursue issues six and seven, because they are narrow and distinct issues capable of separate determination, and because of the need for new counsel to be substituted for these limited issues for all parties;

IT IS HEREBY ORDERED that Kurz-Moran Shipping Agencies, Inc.,

Stute International, Inc., MBS Diesel-Sulzer Diesel, and Eagan Marine are dismissed as parties defendant in the above-captioned case with respect to any issue not previously ruled upon by this Court, preserving to said parties, however, the benefit and imposing upon all parties the burdens of the issues previously determined.

Ambassador Factors is afforded sixty (60) days from the date of entry of this Order to initiate an adversary proceeding, should there be a basis for doing so, to determine the extent, validity and priority of the liens of said creditors. Upon expiration of said sixty (60) days without the filing of further litigation, the validity, priority and amount of the claims will be allowed as filed in this Court and in accordance with previous rulings, subject only to further modification by the Court should the Trustee administering this case seek further determination of any matter affecting the claims.

That leaves remaining the primary issue whether the freights of the last voyage of the M/V Delaware Bay were earned by the Debtor or by FABC and if earned by the Debtor whether those freights are subject to the security interest of Ambassador Factors. In this regard the Court has considered the argument of counsel, the documents filed subsequent to the pre-trial conference, and rules as follows:

- 1) The charter of the M/V Delaware was terminated pre-petition by FABC and the

ship thereafter operated at the direction of FABC (affidavit of Jack Watson dated March 19, 1992). Prior to termination, the Debtor was entitled to treat as fully earned the freights collected on non-military cargo,<sup>1</sup> but by contract, had not fully earned the freights of military cargo loaded on that vessel.<sup>2</sup> Ambassador has therefore made a *prima facie* case that Debtor earned, and that Ambassador's security interest attached, to non-military freights. FABC bears the burden of going forward to demonstrate, if it can, that it earned these freights. FABC contends that the "financial instability rule" negates the language of the bill of lading governing the point at which freights of non-military cargo are earned. Whether the financial instability rule negates the terms of the bill of lading of the cargo is a fact-specific question which will be determined at trial. FABC has the burden of going forward on this issue.

- 2) As to the military freights, Ambassador has the burden of going forward to demonstrate that Debtor earned any portion of the military freights. In the absence of said proof it will be concluded that FABC earned the military freights of the final voyage of the M/V Delaware Bay.

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<sup>1</sup> "Full freight to the port or point of delivery under the transportation agreement shall be completely earned upon receipt of the Goods by the carrier . . . ." (Ex. 38; bill of lading).

<sup>2</sup> "Freight shall be earned upon delivery of the container to the ultimate destination set forth in the Shipping Order or applicable amendments." MSC Container Agreement and Rate Guide, RG-36, First Cycle, effective October 1, 1989, Section G-7a, p. 273.

- 3) Ambassador Factors has made a *prima facie* showing to the Court that approximately \$1,307,738.00 was collected on the final voyage of which \$394,872.00 constituted proceeds of military cargo and \$911,916.00 constituted proceeds of non-military cargo. (Exhibit 20). FABC contends that figure is only an estimate, and that average freights of a fully-loaded vessel should have been \$1,800,000.00. This is a factual question and FABC will have the burden of going forward on the question of the amount of freights earned on the final voyage.
- 4) FABC claims that under 11 U.S.C. Section 506(c) it can surcharge freights earned by the Debtor, by virtue of its performing the final voyage of the vessel, directly against Ambassador. According to the statutory language, that right accrues only to the Trustee and FABC's contention is overruled. In the alternative, this relief would effectively circumvent this Court's ruling that FABC cannot hold a lien on its own vessels.<sup>3</sup> Accordingly, no evidence will be admitted on the surcharge question.

This case has been pending since 1990. The primary reason for the delay in setting these remaining issues for trial was the desire of the Court to try, in a single

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<sup>3</sup> See Ambassador Factors v. First American Bulk Carrier Corp. (Matter of Topgallant, Inc.), Case No. 89-41996, Adv. Pro. 90-4072, slip op. at 21 (Bankr.S.D. Ga., February 5, 1995)(Davis, J.).

proceeding, all issues. Thus, trial of this matter was stayed pending the appeal of my previous rulings on summary judgment. Insofar as I can determine, no other issues remain in this case except those set forth above. IT IS ORDERED that any other issue not raised by an amendment to the pre-trial order filed on or before August 23, 1996, is deemed waived.

Because of the age of the underlying Chapter 11 case, the voluminous proceedings, extensive discovery in this and other adversaries, it is clear that extensive reference may be made by the parties to documents, depositions or other testimony, prior orders, and proceedings of which this Court might take judicial notice. The parties have already listed all exhibits in their joint Pre-Trial Order. They are FURTHER ORDERED to:

- a) File copies of all exhibits, or relevant excerpts thereof, tabbed, indexed, and highlighted to identify the specific portion which is considered relevant;
- b) File copies of any order, document, testimony or other portion of this Court's file, or any relevant excerpt thereof, of which the Court will be asked to take judicial notice at trial;

c) All such copies shall be jointly filed on or before August 30, 1996, and specific written objection to any such document shall be filed on or before September 6, 1996, or it will be deemed waived.

The above-captioned case will be assigned for a pre-trial and settlement conference at 10:00 o'clock a.m., on September 16, 1996, to address any remaining preliminary issues and assigned for trial, if not settled, on September 27, 1996, at 10:00 o'clock a.m.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of August, 1996.